

1940

## Alton R. Mayers v. M. J. Bronson : Brief of Petitioner and Relator, Alton R. Mayers

Utah Supreme Court

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Ball and Musser; Attorneys for Petitioner;

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Case No. 6252

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# In the Supreme Court of the State of Utah

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ALTON R. MAYERS,  
*Petitioner and Relator,*

vs.

M. J. BRONSON, one of the Judges  
of the Third Judicial District  
Court of the State of Utah, and  
the THIRD JUDICIAL DISTRICT  
COURT OF THE STATE OF UTAH IN  
AND FOR SALT LAKE COUNTY,  
*Defendants.*

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Brief of Petitioner and Relator,  
Alton R. Mayers

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BALL AND MUSSER,

**FILED** Attorneys for Petitioner.

JUL 26 1940

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COURT OF THE STATE OF UTAH IN  
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*Defendants.*

Case No. 6252

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## Brief of Petitioner and Relator, Alton R. Mayers, Hereinafter Called Petitioner

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### STATEMENT OF THE CASE.

Nellie R. Mayers died June 11, 1939. Her estate is being probated in the Probate Division of the Third Judicial District Court in and for Salt Lake County, Utah.

On the 8th day of January, 1940, the state tax commission sought to subpoena Alton R. Mayers, son of the

deceased and one of the executors of her last will and testament. The subpoena directed Mr. Mayers to appear before the tax commission January 15, 1940, and to bring with him certain papers and documents, and to submit himself to examination concerning certain property claimed by the tax commission to be subject to tax as property in which said deceased owned an interest at the time of her death. Mr. Mayers consulted his counsel, and being advised that in their opinion the tax commission had no power to issue the subpoena for the purpose designated, did not attend at the appointed time.

Pursuant to petition of the tax commission, the defendant court issued an order to show cause why Mr. Mayers should not be held in contempt.

The court found Mr. Mayers guilty of contempt and on the 29th day of March, 1940, ordered him to appear before the tax commission to purge himself of such contempt or in the alternative to appear before the court for sentence. The time for such appearance was first set for April 8, 1940, but was later extended to May 8, 1940. Before the day set, Mr. Mayers secured from this court an alternative writ of prohibition which he now seeks to have made permanent.

### ERRORS RELIED UPON.

The following is a statement of the errors upon which petitioner relies for a reversal of the order of the defendant court. The court erred:

(1) In making its order, Exhibit "C" to petitioner's Petition for Writ of Prohibition, and setting down for hearing the tax commission's Petition for Warrant or for Order to Show Cause, Exhibit "B" to petitioner's said Petition.

(2) In issuing its citation (Exhibit "D" to petitioner's said Petition) requiring petitioner to appear and show cause why he shouldn't be held in contempt for his failure to respond to subpoena, Exhibit "A" to petitioner's said Petition.

(3) In overruling petitioner's Demurrer to said Petition for Warrant or for Order to Show Cause, which Demurrer appears as Exhibit "E" to petitioner's said Petition.

(4) In disregarding the prayer of petitioner's Response and Answer (Exhibit "F" to petitioner's said Petition), praying that said order to show cause and citation based thereon be dismissed.

(5) In entering its Memorandum Decision, Exhibit "G" to petitioner's said Petition.

(6) In making its Findings of Fact and Conclusions of Law, Exhibit "H" to petitioner's said Petition.

(7) In making its order finding petitioner guilty of contempt of the state tax commission under section 104-45-15, R. S. of Utah, 1933, and ordering him to purge himself of said contempt by appearing before the tax commission in response to said subpoena or in the alternative to appear before the court for sentence.

(8) In denying petitioner's motion to set aside said Findings of Fact and Conclusions of Law and to quash said order, Exhibit "I", as modified by order, Exhibit "J" to petitioner's said Petition.

### PARTICULAR QUESTIONS INVOLVED.

1. Is prohibition a proper remedy?
2. The power to issue subpoenas must rest on positive grant and not on implication.
3. Had the tax commission power to issue a subpoena to compel the attendance of petitioner in the matter of the inheritance tax liability of said estate?
4. Is petitioner in contempt?

### ARGUMENT.

The defendant M. J. Bronson contends and has held and found that the state tax commission is charged with the duty of administering the provisions of chapter 12, title 80, R. S. of Utah, 1933, as amended, otherwise known as the inheritance tax law; that the commission at the times in question was lawfully and in accordance with its statutory duties investigating the inheritance tax liability of the estate of said deceased insofar as the property located at 41-43 Broadway, Salt Lake City, Utah, was concerned; that the commission has authority and the duty under section 80-12-37, R. S. of Utah, 1933, to investigate whether or not any property may be liable for inheritance tax, although it does not have authority to determine the amount of such tax; that the commission



has authority and power under subdivision 16 of section 80-5-46, R. S. of Utah, 1933, to subpoena witnesses and require the production of books, records, and documents, etc., relating to its investigation into whether or not any property may be liable for inheritance taxes and that it duly issued a subpoena to the petitioner herein and that said subpoena was duly served upon him, commanding him to appear before the commission and take with him certain records, books, papers and documents set forth in said subpoena.

The petitioner, on the other hand, contends that the tax commission is not charged with the duty of administering the provisions of said inheritance tax law, and that on the contrary the district courts of the state of Utah in the exercise of their jurisdiction in probate matters are charged with said duties and the duty of making investigations and determinations of inheritance tax liability, and that the only duty with which the commission is charged is that of enforcing collection of such taxes after the same have been duly determined and fixed by the district courts pursuant to the provisions of said chapter 12. The petitioner admits that in certain cases the tax commission is charged with the duty of investigating the taxability of transfers of property but denies that it has any power to issue a subpoena in connection with such investigation.

The argument of petitioner will be devoted to showing: (a) that prohibition is a proper remedy in the instant case, (b) that the power to issue subpoenas must

rest on positive grant and not on implication, (c) that the tax commission was without authority to issue a subpoena to compel the attendance of petitioner and the production of his books and records, and (d) that petitioner was not in contempt.

## I.

### PROHIBITION IS A PROPER REMEDY.

The defendants by their demurrer have questioned the right of the petitioner to secure relief by way of writ of prohibition and they contend that petitioner has an adequate remedy by "appeal from the judgment of the defendants." Prohibition is a proper remedy in a situation such as this.

In a Wisconsin case an attempt was made to punish the publication of a newspaper editorial as a contempt. It appeared that during a bitter campaign over a judgeship petitioner made certain charges in an editorial column against Judge Bailey, a candidate for reelection. Judge Bailey issued an order adjudging the publisher guilty of a contempt when the latter filed an affidavit of the truth of the charges made, and the judge committed petitioner to jail. The commitment was placed with the sheriff but was not executed by him. The court said:

"We do not think that in a case like the present, where immediate imprisonment was threatened and about to be inflicted either writ of error or habeas corpus can be said to be an adequate remedy. In either case the trial must have

been concluded and sentence imposed before the writ could issue, and in the case of habeas corpus the imprisonment must have actually begun. There certainly is grave doubt whether certiorari would lie in any event. In view of these considerations, it seems certain that neither of the last-named writs would afford an adequate remedy, even conceding that they would be applicable. Prohibition has been used in other jurisdictions in similar cases." *State v. Circuit Court*, 97 Wis. 1, 65 Am. St. Rep. 90, 72 N. W. 193, 38 L. R. A. 554.

In *Smith v. Kimball*, 76 Utah 350, 289 P. 588, 70 A. L. R. 101, judgment was rendered against the petitioner by the district court requiring him to refrain from interfering with certain water rights decreed to belong to one Morris. Pending determination of the case on appeal and after petitioner had given supersedeas to stay the judgment and had filed a bond to protect Morris, the lower court undertook to compel petitioner to obey the judgment until it was modified or reversed on appeal. Petitioner was adjudged guilty of contempt and ordered to pay \$100 or go to jail. Petitioner applied for a writ of prohibition and it was contended that appeal was adequate. The court pointed out, however, that appeal from the contempt judgment in no way afforded any protection against further contempts if he thereafter failed to obey the original judgment.

In the instant case the same argument applies. Had petitioner refused to appear before the tax commission and had he appeared before the judge for sentence and then had appealed from that judgment, he would still

have been subject to further adjudications of contempt so long as he failed to appear before the tax commission.

In an Ohio case, *Dickey v. Brokaw*, 53 Ohio App. 141, 4 N. E. (2d) 411 (1936), a notary public attempted to punish petitioner for failing to appear before him to have a deposition taken. It was contended by the notary that petitioner had an adequate remedy by submitting to imprisonment and then applying for a writ of habeas corpus. The court issued a writ of prohibition and said:

“Surely it cannot be said that one has an adequate remedy at law who must first submit to imprisonment and then apply for a writ of habeas corpus, it being clear that the writ of habeas corpus issues only when one is unlawfully detained or deprived of his liberty. Can it be said that such remedy would be adequate to remove the stigma of arrest and imprisonment by a person without authority to commit to imprisonment? We think not.”

In the case of *Allen v. Lindbeck*, 97 Utah 471, 93 P. (2d) 920 (1939), the petitioner was dispossessed of milk bottles by means of a search warrant issued by defendant justice of the peace, and based upon an invalid statute. The court made the alternative writ of prohibition permanent and ordered restitution of the bottles even though it was objected the petitioner could give up the bottles or put up a bond and appeal from any decision of the justice. This court held that appeal in such a case would not be an adequate remedy because it would involve the loss of bottles or money and would cast upon the petitioner the stigma of a quasi criminal conviction.

In the case of *Evans v. Evans*, ..... Utah ....., 98 P. (2d) 703 (1940), prohibition was held to be a proper remedy to protect petitioner from an order of the lower court too broad in scope requiring him to produce all books and records of a certain corporation before a notary in order that his deposition might be taken and the books examined. This court felt that appeal in that case was not an adequate remedy for the reason that in the alternative the petitioner would be faced with a jail sentence or compliance with the order, and compliance might reveal confidential matters not related to the controversy.

In the instant case Mr. Mayers has his choice of appearing before the tax commission with his books and records or appearing before the court for sentence. Either alternative would cause him irreparable injury. In case of election to appear before the tax commission, confidential matters not related to the controversy might be revealed. In case of election to appear before the court sentence would be imposed and he would be smirched by the stigma of a quasi criminal conviction, and then he must be imprisoned or raise bond for appeal.

## II.

THE POWER TO ISSUE SUBPOENAES MUST REST UPON  
POSITIVE GRANT AND NOT UPON IMPLICATION.

The use of compulsion of any sort with a view to securing information for use against the witness or those in privity with him by a commission or a person before whom the inquisition is held, should be scrutinized to see

that it does not lightly deprive the citizen of valuable rights.

In *re Pacific Railway Commission*, 32 Fed. 241 (1887). Congress had authorized a three-man commission to investigate books, accounts and methods of railroads which had received aid from the United States, and to that end had authorized the commission to require the attendance of witnesses and the production of their books and records. The commissioners had required the attendance of Mr. Leland Stanford who refused to answer certain questions or to explain certain vouchers and expenditures made by his company. The commissioners applied for an order of the court requiring him to show cause why he should not answer the questions propounded to him. The court refused the order. Mr. Justice Field at page 250 says:

“Of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all other rights would lose half their value.”

In the case of *Boyd v. United States*, 116 U. S. 616, 29 L. Ed. 746 (1886), which involved the forfeiture of certain plate glass for non-payment of duty and in which the district judge had ordered the claimants to produce



the invoice covering the glass, it was said by Mr. Justice Bradley:

“And any compulsory discovery by extorting the party’s oath, or compelling the production of his private books and papers, to convict him of crime or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom.”

In *re Klein*, 138 Misc. 282, 245 N. Y. S. 486 (1930). In this case a permanent receiver sought to subpoena persons to give evidence before him under a statute providing that permanent receivers shall have power “to examine on oath, to be administered by one of the receivers, any person touching any matter pertaining to or affecting the receivership.” It was contended by the receiver that this statute should be read in connection with the Civil Practice Act giving “judges and other persons” the right to subpoena when by law they were authorized to take evidence. The court granted the motion to vacate the subpoenas and said:

“I doubt, in view of the orderly manner provided by section 170 for the attendance and examination of witnesses (providing for petition by the receiver to the court for an order requiring persons to appear before the court or referee and submit to examination) that the Legislature intended to clothe all receivers with unlimited authority during the existence of the receivership to subpoena any and all persons to attend at his

office and be examined about any matter pertaining to or affecting the receivership. To vest a subordinant ministerial officer of the court, often not a lawyer, with such broad power, is repugnant to our system for the administration of justice. *But if such were the intention of the Legislature it would have so stated in express terms.*" (Italics ours).

*Federal Trade Commission v. American Tobacco Co.*, 264 U. S. 298, 44 Sup. Ct. 336, 68 L. Ed. 696, 32 A. L. R. 786 (1924). Congress authorized the Federal Trade Commission to require the attendance of witnesses and the production by subpoena of documentary evidence relating to any matter under investigation. In order to gather information concerning unfair methods of competition in the tobacco industry, the commission petitioned for writs of mandamus to compel two tobacco companies to submit to investigation of all accounts, books, records, documents, memoranda, contracts and correspondence with jobbers. The court denied the petitions on the ground that the power sought to be exercised was too broad in scope. Mr. Justice Holmes said:

"Anyone who respects the spirit as well as the letter of the 4th Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire (*Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 479, 38 L. ed. 1047, 1058, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125), and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. We do not discuss the question whether it could do so if it tried, as



nothing short of the most explicit language would induce us to attribute to Congress that intent.”

See also *Harriman v. Interstate Commerce Commission*, 211 U. S. 407, 53 L. Ed. 253, 29 Sup. Ct. 115 (1908); *U. S. v. Louisville and Nashville R. Co.*, 236 U. S. 318, 59 L. Ed. 598, 35 Sup. Ct. 363 (1915); and *Federal Trade Commission v. P. Lorillard Co.*, 283 F. 999 (1922).

*Ward Baking Co. v. Western Union Tel. Co.*, 205 App. Div. 723, 200 N. Y. S. 865. One Peters was found dead. Walter S. Ward informed authorities that he had killed Peters in self defense. Ward was indicted by a grand jury but the prosecution was delayed, apparently for lack of evidence and finally the case was dismissed. The governor of the state thereafter requested the attorney general to inquire into the facts upon the authority of a statute empowering the attorney general to subpoena witnesses and take other steps when directed to by the governor for purposes of inquiring into matters concerning the “public peace, public safety and public justice.” The attorney general subpoenaed cablegrams in the hands of the Telegraph Co. and the Ward Baking Co. brought suit to enjoin the delivery of the cablegrams. The court granted the injunction upon the ground that the executive power did not authorize the procedure used. The court said:

“It is unthinkable that the Legislature when it enacted the provisions of subdivision 8 of section 62 of the Executive Law, intended to provide for a criminal investigation against a particular individual in reference to which that individual

would be stripped of all the privileges and safeguards which otherwise would be accorded him."

*Kilbourn v. Thompson*, 103 U. S. 168, 26 L. Ed. 377 (1881). Hallet Kilbourn was subpoenaed before the House of Representatives and ordered to bring records, papers and maps showing the nature and history of a real estate pool in which Kilbourn's company, Jay Cooke & Co., were interested, the United States being a creditor of that company, then in bankruptcy. Kilbourn refused to obey the subpoena and was imprisoned. He sued the sergeant-at-arms and several members of the House. The case was returned to the lower court for a new trial as to the sergeant-at-arms and was dismissed as to the members. The court held that the investigation was not related to any proposed legislation and was judicial in its nature and beyond the power of Congress. See also *In re Investigation of Contracts*, 113 Misc. 370, 184 N. Y. S. 518 (1920); and *Matter of Barnes*, 204 N. Y. S. 108, 97 N. E. 508 (1912).

*Go-Bart Importing Co. v. U. S.*, 282 U. S. 344, 75 L. Ed. 374 (1931). Officers entered the premises of the petitioning company and took therefrom books, records and other papers under a search warrant which recited a complaint which did not state facts sufficient to constitute an offense. The company asked for an order enjoining the use of the papers as evidence. The court held that the order should have been granted on the ground that the search warrant was invalid and the seizure of the papers unlawful. See also *Grau v. U. S.*,

287 U. S. 124, 77 L. Ed. 212 (1932); and *Sgro v. U. S.*, 287 U. S. 206, 77 L. Ed. 260 (1932).

### III.

#### TAX COMMISSION WAS WITHOUT AUTHORITY TO ISSUE SUBPOENA.

All of our taxing statutes are assembled in title 80 of the Revised Statutes of Utah, 1933, under the designation "Revenue and Taxation."

This title is divided into fourteen chapters. The first eleven chapters relate exclusively to the assessment and collection of taxes on real and personal property and matters incidental to such assessment and collection, except as to chapter eleven which also deals with the subject of bond issues of political subdivisions.

Chapter twelve relates to the inheritance tax, chapter thirteen to the franchise and privilege tax and chapter fourteen to the individual income tax.

The chapter headings of chapters one to eleven inclusive are:

- Chapter 1. Tax on Tangible Property.
- Chapter 2. Exemptions.
- Chapter 3. Definitions.
- Chapter 4. Situs.
- Chapter 5. Assessment of Property.
- Chapter 6. Apportionment.
- Chapter 7. Equalization.
- Chapter 8. County Auditor's Duties.
- Chapter 9. Levies.
- Chapter 10. Collection of Taxes.
- Chapter 11. Miscellaneous Provisions.

Chapter 5 above, which is entitled “Assessment of Property,” and which contains 80-5-46 (16), the section relied upon by the tax commission as its authority for issuance of the subpoena in question, is divided into sixty-four sections with section headings as follows:

#### ASSESSMENT OF PROPERTY.

- 80-5-1. At Cash Value, Mandatory.
- 80-5-2. By County Assessor—Basis of Property Taxation for County and Subdivisions.
- 80-5-3. By State Tax Commission—Properties Assessed by, Enumerated.

#### BY COUNTY ASSESSORS.

- 80-5-4. General Duties of County Assessors.
- 80-5-5. Of Property in Cities and Towns.
- 80-5-6. Id. Report of Valuation to Municipal Authorities.
- 80-5-7. Of Property Brought into County after January 1.
- 80-5-8. Statements by Taxpayers.
- 80-5-9. Id. Power of Assessors Respecting—Delict of Taxpayer—Penalty.
- 80-5-10. Id. Assessor to Estimate Value.
- 80-5-11. Id. Assessor to Report Information Gained to Other Counties.
- 80-5-12. In Name of Owner, Mandatory, If Known—If Unknown.
- 80-5-13. In Name of Representative—Designation.
- 80-5-14. Of Property of Decedents.
- 80-5-15. Of Property in Litigation.
- 80-5-16. Of Concealed Property—Penalty.
- 80-5-17. Of Property Escaping Assessment.
- 80-5-18. In Name of Claimant as Well as Owner.

## OF TRANSIENT LIVESTOCK.

- 80-5-19. Brought Into State for Grazing.
- 80-5-20. Being Fed or Removed for Slaughter.
- 80-5-21. May Be Assessed at Any Time.
- 80-5-22. Statement of Owner—Contents.
- 80-5-23. Certificate by Assessor.
- 80-5-24. Id. Filing in Other Counties.
- 80-5-25. Prorating Taxes Among Counties.
- 80-5-26. Additional Assessment to Cover Full Number.
- 80-5-27. Collection of Unpaid Taxes by Action.
- 80-5-28. Id. Attachment.
- 80-5-29. Tax Rates to be Applied.

## FURTHER DUTIES OF COUNTY ASSESSORS.

- 80-5-30. To Subscribe Assessment Book—Affidavit.
- 80-5-31. To Keep Plat Book.
- 80-5-32. To Furnish Information to State Tax Commission.
- 80-5-33. Id. Penalty for Neglect.
- 80-5-34. Liability for Willful Neglect of Duty.
- 80-5-35. Id. Action on Official Bond.
- 80-5-36. Id. Judgment.

## STATE TAX COMMISSION.

- 80-5-37. Number—Term—Appointment—Eligibility—Removal.
- 80-5-38. Qualifications—Reappointment.
- 80-5-39. Official Oath and Bond.
- 80-5-40. Chairman—Quorum—Sessions.
- 80-5-41. Secretary and Assistants.
- 80-5-42. Id. Salaries—Terms—Duties—Bonds.

- 80-5-43. Offices at Capitol—Equipment—Branch Offices.
- 80-5-44. Seal—Attested Documents, Evidence.
- 80-5-45. Salaries of Commissioners.
- 80-5-46. General Powers and Duties.
- 80-5-47. Equalization of Values—Hearings—Venue.
- 80-5-48. To Furnish Assessment Book to Counties.
- 80-5-49. To Furnish Forms for Taxpayers' Statements.
- 80-5-50. State Lands—Land Board to Furnish Lists.
- 80-5-51. Id. Tax Commission to Furnish List of Patented Lands to County Assessors.

#### ASSESSMENT BY STATE TAX COMMISSION.

- 80-5-52. Time for—Notice to Taxpayer.
- 80-5-53. Taxpayers' Statements—Delict—Penalty.
- 80-5-54. Record Book of Assessment of Railroads, etc.
- 80-5-55. Assessment Book of Mines.
- 80-5-56. Assessment of Mines.
- 80-5-57. Id. "Net Annual Proceeds" Defined.
- 80-5-58. Id. Deductions Not Allowed, Enumerated.
- 80-5-59. Id. Taxpayers' Statement—For Metalliferous Mines.
- 80-5-60. Id. For Nonmetalliferous Mines.
- 80-5-61. Delict of Taxpayer—Penalty—Assessment Without Statement.
- 80-5-62. Id. Duties of Tax Commission and County Auditors.
- 80-5-63. Id. Assessment of Improvements, Machinery, etc.
- 80-5-64. Id. Collection of Tax-Lien.

From the foregoing section headings it will be seen that all of the sixty-four sections of Chapter 5, including section 46 which defines the powers and duties of the tax commission, do in fact relate exclusively to the assessment and collection of taxes on real and personal property and matters incidental thereto.

This becomes more apparent when it is remembered that in 1931 when the tax commission was created, and when the power to subpoena witnesses and require production of books and records substantially as it now exists in Section 80-5-46 (16) was conferred upon it, the commission had no duties to perform and no powers to exercise with respect to inheritance taxes. At that time all powers relating to collection of inheritance taxes subsequently conferred on the tax commission were vested in the attorney general.

The law creating the tax commission appears in Chapter 53, Session Laws 1931, and the powers conferred on the commission appear as Section 5984 of that chapter. These powers with respect to issuance of subpoenas and production of books and records, which are substantially as now claimed by the commission, are found in subsections 15 and 16 of said Section 5984, and are as follows:

15. To examine all records, books, papers, and documents, relating to the valuation of property of any corporation or individual, and to summon witnesses to appear and give testimony and to produce records, books, papers, and documents relating to any matter which the tax com-

mission shall have the authority to investigate or determine.

16. To cause the deposition of witnesses residing within or without the State, or absent therefrom, to be taken upon notice to the interested party, if any, in like manner that depositions are taken in civil actions pending in the district court in any matter which the tax commission shall have the authority to investigate or determine.

No power concerning the assessment or collection of inheritance taxes having been conferred on the tax commission in 1931 by the act of its creation, and the act of its creation having defined its powers relating to issuance of subpoenas and production of books and records, and the powers conferred on the commission by that act being powers relating exclusively to the assessment and collection of taxes on real and personal property, it is evident that the legislature did not confer and did not intend to confer on the commission any subpoena powers whatever with respect to inheritance tax matters.

The commission's asserted power to subpoena the petitioner is found in 80-5-46 (16) R. S. Utah 1933, which is as follows:

“To examine all records, books, papers and documents relating to the valuation of property of any corporation or individual, and to subpoena witnesses to appear and give testimony and to produce records, books, papers and documents relating to any matter which the tax commission shall have authority to investigate or determine. The tax commission or any party may in any



investigation cause depositions of witnesses to be taken as in civil actions. Any member of the state tax commission, its secretary, cashier, and such other officers or employees as the commission may designate, may administer oaths and affirmations in any matter or proceeding relating to the exercise of the powers and duties of the tax commission."

As previously stated, at the time of its creation and until the 1933 revision the commission had nothing whatever to do with inheritance taxes. The right to collect such taxes at that time was vested in the attorney general who was ex officio collector of inheritance taxes, made such by Chapter 64, Laws of Utah, 1919, Section 3198, which so far as pertinent to inheritance taxes is as follows:

"The Attorney General shall be ex-officio collector of all inheritance taxes arising under the laws of this State, and shall represent the State in all matters pertaining to the collection of such taxes. He shall have access to all records and files relating to inheritance taxes in any of the counties of the State and may institute proceedings in the name of the State Treasurer for the collection of such tax, and for this purpose may call to his assistance the district and county attorneys of the various districts and counties of the State. \* \* \*"

Having created the tax commission in 1931, and having given it certain powers concerning the assessment and collection of taxes, it was only logical that the powers previously exercised by the attorney general with regard to collection of inheritance taxes should be vested

in it, and accordingly in 1933 by Section 80-12-27, R. S. of Utah 1933, the commission was made ex-officio collector of such taxes. That section is as follows:

“The state tax commission shall be ex-officio collector of such taxes, and shall represent the state in all matters pertaining *to the collection* of such taxes. It shall have access to all records and files affecting such taxes in any of the counties of the state *and may institute proceedings for the collection of such taxes, and* for this purpose may call to its assistance the district and county attorneys of the various districts and counties of the state.” (Italics ours).

And the following powers previously exercised by the attorney general were likewise vested in the tax commission by Section 80-12-28, R. S. of Utah 1933, which reads as follows:

“The state tax commission may demand from executors such information as may be necessary to verify the correctness of the amount of the tax and interest, and when so demanded they shall supply certified copies of such parts of their reports as may be demanded. Upon refusal to comply with such demand of the state tax commission, it is the duty of the clerk of the court to comply with such demand, and the expenses of making such copies and transcripts shall be charged against the estate, as are other costs in probate.”

And by Section 80-12-37, R. S. of Utah 1933, the following powers with respect to inheritance taxes previously exercised by the county clerk were also conferred on the tax commission:

“Any person having knowledge of property liable to such tax, against which no proceeding for enforcing collection thereof is pending, shall report the same to the state tax commission, *and it shall be its duty to investigate the case*, and if it has reason to believe the information to be true, it shall forthwith institute proceedings for the collection of the same.” (Italics ours).

Aside from the power to issue subpoenas and require production of books and records in connection with the assessment and collection of corporation franchise taxes and individual income taxes (hereinafter referred to), the only power to issue subpoenas or to require production of books and records which the tax commission has or ever had is the power which was conferred upon it in 1931 by the act of its creation. As will be seen, Section 80-5-46 (16) R. S. of Utah, 1933, is merely a recompilation of the powers conferred on the commission by subsections 15 and 16 of Section 5984, Chapter 53, Session Laws of 1931, and as previously stated, the tax commission at the time of its creation in 1931, and at the time this power to issue subpoenas was conferred on it, *had no duties to perform and no powers to exercise with respect to the inheritance tax laws*. Those duties and powers were vested in the district courts, the attorney general and the county clerk. How then can it reasonably be said that the commission had power to issue the subpoena in question.

AUTHORITY TO ISSUE USUALLY FOLLOWS DUTY  
TO FIX TAX LIABILITY.

The power to issue subpoenas and require production of books and records is usually conferred as an incident to the duty to make a determination of tax liability. Otherwise such duty cannot be effectively discharged.

By 80-5-3, 80-5-46, 80-5-52 and other sections of Chapter 5, Title 80, the duty to make an assessment and determine the value of real and personal property for taxation purposes is imposed upon the tax commission and being charged with that duty the legislature saw fit by subdivision 16 of 80-5-46 to vest in it the power to require the attendance of witnesses and the production of books and records.

By Chapter 13 of title 80 relating to franchise and privilege tax, the tax commission is charged with the duty of making a determination of the tax liability of each taxpayer subject to that tax. Such taxpayer is required to submit to the commission a duly verified return showing various data pertinent to the calculation of the tax and showing how the calculation is arrived at, but it is the ultimate duty of the commission to fix and establish the amount of tax due in each instance, and having charged the commission with this duty, the legislature saw fit to confer upon it the power to require the attendance of witnesses and the production of books and records.

That the commission is charged with this duty is shown among other sections by 80-13-47, which is as follows:

“Within thirty days after notice of any decision of the tax commission, any party affected thereby may apply to the supreme court for a writ of certiorari or review for the purpose of having the lawfulness of such decision inquired into and determined. Such writ shall be made returnable not later than thirty days after the date of the issuance thereof, and shall direct the tax commission to certify its record, which shall include all the proceedings and the evidence taken in the case, to the court. Upon the hearing no new or additional evidence may be introduced, but the cause shall be heard on the record before the tax commission as certified to by it. The decision of the tax commission may be reviewed both upon the law and the facts, and the provisions of the code of civil procedure relating to proceedings in the supreme court shall, so far as applicable and not in conflict with this chapter, apply to the proceedings in the supreme court under the provisions of this section.”

The power of the commission to subpoena witnesses and require production of books and records in connection with the determination of franchise and privilege taxes is conferred by subdivision (2), 80-13-53 in the following language:

“(2) The tax commission, for the purpose of ascertaining the correctness of any return or for the purpose of making an estimate of net income of any corporation where information has been obtained, shall also have power to examine or to cause to have examined, by any

agent or representative designated by it for that purpose, any books, papers, records or memoranda bearing upon the matters required to be included in the return, and may require the attendance of any officer or employee of the corporation rendering such return or the attendance of any other person having knowledge in the premises, and may take testimony and require proof material for its information.”

By chapter 14 of title 80 relating to individual income tax, the tax commission is charged with the duty of making a determination of the tax liability of each taxpayer subject to that tax. Each such taxpayer is required to submit to the commission a duly verified return showing various data pertinent to the calculation of the tax and showing how the calculation is arrived at, but as in the case of the franchise and privilege tax, it is the ultimate duty of the commission to fix and establish the amount of tax due in each instance, and having charged the commission with that duty, the legislature saw fit to confer upon it the power to require the attendance of witnesses and the production of books and records.

That the commission is charged with this duty is shown, among other sections, by 80-14-40, which is as follows:

“Within thirty days after notice of any decision of the tax commission any party affected thereby may apply to the supreme court of this state for a writ of certiorari or review for the purpose of having the lawfulness of such decision inquired into and determined. Such writ shall



be made returnable not later than thirty days after the date of the issuance thereof, and shall direct the tax commission to certify its record, which shall include all the proceedings and the evidence taken in the case, to the court. Upon the hearing no new or additional evidence may be introduced, but the cause shall be heard on the record before the tax commission as certified to by it. The decision of the tax commission may be reviewed both upon the law and the facts, and the provisions of the code of civil procedure relating to proceedings in the supreme court shall, so far as applicable and not in conflict with this chapter, apply to the proceedings in the supreme court under the provisions of this section."

The power of the commission to subpoena witnesses and to require the production of books and records in connection with the determination of individual income taxes is conferred by subdivision (2) of 80-14-56 in the following language:

"(2) The tax commission, for the purpose of ascertaining the correctness of any return or for the purpose of making an estimate of taxable income of any person where information has been obtained, shall also have power to examine or to cause to have examined, by any agent or representative designated by it for that purpose, any books, papers, records or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take testimony and require proof material for its information."

As pointed out above, the tax commission under the chapters of title 80 relating to the assessment and determination of the value of real and personal property, and under the chapter relating to the franchise and privilege tax and the one relating to individual income tax, was in each instance charged with the duty of fixing and establishing the amount of such taxes, and having been charged with that responsibility it was given the correlative power of subpoenaing witnesses and requiring them to produce their books and records bearing on those matters.

But what do we find with respect to Chapter 12 of Title 80, covering the subject of inheritance tax? Do we find that by that chapter the tax commission is charged with the duty of making a determination of inheritance tax liability or that by that chapter there is conferred upon it the power to subpoena witnesses and to require them to produce their books and records? We do not. What we do find is that no such duty was cast upon the commission and that no such power was conferred upon it, and that on the contrary the duty of making such determination and of fixing such tax liability was imposed exclusively on the district courts of this state which in the ordinary course of events have power to issue subpoenas *duces tecum*.

The jurisdiction of the district courts to determine inheritance tax liability is conferred by 80-12-35, which reads:

“The district court having either principal or ancillary jurisdiction of the settlement of the



estate of a decedent shall have jurisdiction *to hear and determine all questions in relation to said tax* that may arise affecting any devise, legacy or inheritance, or any grant or gift, or any transfer of title by right of survivorship, under this chapter, subject to appeal as in other cases, and the state tax commission shall represent the interests of the state in any such proceedings.” (Italics ours).

Under the inheritance tax law an executor or administrator is not required to make any return or report to the tax commission but instead is required to file with the clerk of court a report in which among other things all assets belonging to decedent at the time of his death must be inventoried, and the assets and property so inventoried are required to be appraised by inheritance tax appraisers appointed for that purpose, and based upon such appraisal the amount of tax due to the state *is fixed and determined by order of the court.*

As previously shown, the only rights or duties ever conferred upon the tax commission with respect to inheritance taxes are the identical rights and duties concerning such taxes previously exercised by the attorney general or the county clerk. In the exercise of these rights and duties neither the attorney general nor the county clerk had power to issue subpoenas.

By the act of its creation in 1931 the tax commission was given power to issue subpoenas and require production of records “relating to any matter which the tax commission shall have authority to investigate or

determine.” Obviously the legislature was speaking of matters relating to real and personal property taxation which the commission *then* had authority to investigate or determine; otherwise it would have said “relating to either ad valorem or excise taxation which now or in the future it shall have authority to investigatge or determine.”

The right now claimed by the commission to investigate the tax liability of the estate of Nellie R. Mayers, deceased, is claimed by virtue of 80-12-37, *supra*, where it is said that if any person having knowledge of property liable to the inheritance tax, against which no proceeding for enforcement of collection is pending, shall report the same to the tax commission, it shall be its duty to “investigate the case.” This section is identical with Sec. 3208, Chapter 64, Laws 1919, p. 173, except that as originally enacted it was the county clerk upon whom the duty to “investigate the case” was cast.

It takes a long stretch of the imagination to suppose that by conferring on the tax commission in 1933 a power previously reposed in the county clerk to investigate a case under the circumstances mentioned in the 1919 statute just referred to, the legislature meant to invest the commission with any greater or different powers than were previously exercised by the county clerk.

In the 1931 statute creating the tax commission it was given the power with respect to the assessment of real and personal property taxes to require production

of records relating to any matter which the commission had authority to investigate or determine. By the 1919 statute, *supra*, the county clerk was under the circumstances mentioned required to "investigate the case". The authority to investigate so conferred on the county clerk was with respect to an excise tax whereas the authority conferred on the tax commission was with respect to ad valorem taxes.

We submit that there is no connection or relationship between the authority given the tax commission in 1931 to investigate or determine *matters* relating to its duties with regard to real and personal property and the authority conferred in 1919 on county clerks to *investigate a case* under the inheritance tax law under the circumstances mentioned in the latter situation.

To determine what subpoena power the legislature intended to confer on the tax commission by subdivision 16 of 80-5-46 consideration must be given to the subject matter in connection with which the power to issue subpoenas was granted, and when so considered it is apparent that such subject matter was the assessment and valuation of real and personal property, and did not in any manner relate to inheritance or other excise taxes. Such assessment and valuation was a duty imposed upon the commission by chapter 5 of title 80, and having charged it with that duty the legislature by that same chapter and as an incident to that duty conferred upon the commission the power to issue subpoenas. Therefore, in order to get the true meaning and intention of the legislature, sub-section 16 of 80-5-46

should be read so as to cause the phrase "concerning real and personal property" to appear after the phrase "relating to any matter". With that qualifying phrase inserted that subsection would read as follows:

"To subpoena witnesses to appear and give testimony and to produce records, books, papers and documents relating to any matter (*concerning real and personal property*) which the tax commission shall have authority to investigate or determine."

#### IV.

##### IS PETITIONER IN CONTEMPT?

From what is shown in subdivision II and III of this brief it is apparent that:

1. The tax commission was not created until 1931.
2. The law constituting the attorney general *ex officio* collector of inheritance taxes was enacted in 1919, about twelve years before the tax commission was created.
3. The attorney general was not given the power to subpoena witnesses or to demand the production of books, documents, etc. to aid him in the collection of inheritance taxes.
4. When in 1933 the tax commission was made *ex officio* collector of inheritance taxes, it was not given the power to require the production of books and records or the power to subpoena witnesses. The power it was

given was the same power that had previously been exercised by the attorney general or the county clerk.

5. While as to certain real and personal property the tax commission was given authority to make assessments for taxation purposes and while to that end it was given extraordinary powers under subsection 16 of 80-5-46 with respect to such matters, it was not given any such powers with respect to the collection of inheritance taxes.

6. If the commission had the right under subsection 16 of 80-5-46, to subpoena witnesses in inheritance tax matters, then the enactment of 80-12-37 (a section of the inheritance tax law) was entirely superfluous and unnecessary.

7. The tax commission has no authority to determine the inheritance tax liability of the estate of the deceased in the instant case. By 80-12-37 upon which the commission relies, it is provided that under certain circumstances it shall be the duty of the commission "to investigate the case," but nowhere in said chapter 12 is the commission given the right to subpoena witnesses.

8. It isn't claimed that specific authority is given the commission to issue process to compel the attendance of witnesses and the production of books and records in inheritance tax matters. It is only claimed that by implication the authority given by subsection 16 of 80-5-46 applies to the investigation of a case such as mentioned in 80-12-37.

9. The district courts have sole jurisdiction *to hear and determine all questions relating to inheritance taxes*. That fact precludes the tax commission from making any different investigation than the one which the county clerk was formerly authorized to make under 80-12-37, and the county clerk had no authority to issue a subpoena.

10. The power to subpoena witnesses by a non-judicial board or commission must be specifically and unquestionably granted and cannot rest on mere implication.

11. The power to issue subpoenas follows the duty to determine tax liability and where there is no power to determine or fix tax liability there is no power to issue a subpoena. The district courts and not the tax commission are charged with the duty of fixing inheritance tax liability.

12. What the commission seeks to do in the instant case is to exercise unlimited power to subpoena a witness to appear before it and bring with him books, records, etc.,—not to testify concerning any matter pending before it, or any other tribunal—but to permit it to examine the subpoena witness and his books and records relating to a controversy not now pending before any court, but which might in the future come before the district court, and in which controversy the commission would represent the state.

13. Before the tax commission there is in fact no matter pending concerning the inheritance tax liability

of the estate of said deceased. If required to go before the tax commission petitioner will be subjected to an examination on matters and things about which there are no issues made up by any pleadings or otherwise, and if the documents and papers and books requested by said subpoena be produced, the tax commission will be enabled to examine him and said documents, books, etc. without regard to any such issues or pleadings, or without petitioner knowing in what manner or why or to what extent he will be required to testify or to adduce proof.

14. Nowhere does it appear that the tax commission had authority to issue the subpoena in question to compel the attendance of petitioner or to compel the production of his books or papers. Such authority does not appear by allegation or otherwise in the commission's petition for the warrant.

15. If the tax commission's theory is correct, sooner or later a controversy will be pending before the district court to determine the inheritance tax liability of said deceased. At that hearing the commission will represent the state. It now claims the right to go on a fishing expedition to ascertain what the evidence is or will be when that controversy arises. The commission now has the right to take the deposition of petitioner but not being satisfied with that right it claims the right—a judicial right—to subpoena and compel the attendance of witnesses and books. That right it does not possess in inheritance tax matters.



If petitioner should appear before the commission with his books and records, under what rules and regulations will the commission examine him or them? Will it impound the books and records and will the petitioner be required to take the chance of suffering their inadvertent loss or destruction? If the commission were in the ordinary course to take the deposition of petitioner, then the books and records admitted in evidence in such a proceeding would become a part of the deposition and would be available to the petitioner and all other interested parties.

#### NO CAUSE OF ACTION ALLEGED

The petitioner demurred to the tax commission's Petition for Warrant or for Order to Show Cause (Exhibit "B" to the petitioner's Petition for Writ of Prohibition), upon the ground that the same did not state facts sufficient to constitute a cause of action against him in contempt proceedings or otherwise or at all. The Demurrer should have been sustained inasmuch as it is nowhere therein alleged that the tax commission had authority to investigate the inheritance tax liability of the estate of Nellie R. Mayers, Deceased. It is merely alleged that the tax commission was attempting to investigate such tax liability, without any allegation of right or authority so to do; and neither is it alleged therein that said estate owned the property therein referred to as being located at 41-43 Broadway, in Salt Lake City, and neither is there any allegation therein concerning the value of said property, or tending



to show that said property might be subject to inheritance tax liability.

Because the tax commission's Petition for Warrant or for Order to Show Cause failed to state a cause of action against petitioner, each of the errors relied upon by petitioner is well taken.

It is therefore submitted that petitioner was not in contempt in refusing to respond to said subpoena and that the alternative writ of prohibition herein should now be made permanent.

Respectfully submitted,

BALL AND MUSSER,

*Attorneys for Petitioner.*